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In the Supreme Court of the United States

ANDREW STUART LUSTER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to Court of Appeal of the State of California Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether it is a denial of due process for a state court to refuse to reinstate the direct appeal of a former fugitive who fled during the trial (not during the pendency of the appellate process), who has returned to custody prior to the dismissal order becoming final, whose flight did not prejudice the appellate process, and whose appeal would raise substantial federal constitutional issues, as well as substantial state issues, including sufficiency of the evidence and actual innocence.

PARTIES TO THE PROCEEDINGS

Petitioner
Defendant, Andrew Stuart Luster.

Respondent
The People of the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Stuart Luster, respectfully prays that a Writ of Certiorari issue to review the decision of the Court of Appeal of the State of California, Second Appellate District, Division Six, dismissing his direct appeal without review or a hearing.

OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division Six Order granting respondent People of the State of California's motion dismissing petitioner's appeal appears as Appendix A to this petition. The California Court of Appeal, Second Appellate District, Division Six, Opinion on Denial of Rehearing and Order, appears as Appendix B to this opinion. The California Supreme Court Order denying a Petition for Review appears as Appendix C to this opinion.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal, Second Appellate District, was entered on July 2, 2003. A timely Petition for Review was denied on September 10, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a) wherein a judgment of the Court of Appeal may be reviewed in this Court on Certiorari pursuant to Supreme Court Rules 13. The grounds for invoking this Court's jurisdiction are set forth in Supreme Court Rules 10(b) and 10(c). This petition is timely filed within 90 days of the date the California Supreme Court denied petitioner's Petition for Review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process and Equal Protection Clauses and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested in this case on July 18, 2000 and his bail was eventually set at $10,000,000.[1/] On December 15, 2000, the California Court of Appeal, Division Six, found the $10,000,000 to be excessive and thus unconstitutional and petitioner's bail was reduced to $1,000,000.[2/] An 87-count information filed by the Ventura County District Attorney

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1/ Although petitioner should have been brought to court for arraignment within 48 hours of his arrest, as required by law, law enforcement in Ventura County deliberately kept petitioner in custody for almost a week, until Monday, July 24, 2000. As a result of this action against petitioner (and hundreds of other inmates in Ventura County), a federal class action lawsuit was filed against Ventura County. See Juarez v. County of Ventura, CV 01-1569. Ventura County agreed to settle the lawsuit and petitioner received $300, which represented his share of the settlement. (See appellant's Opposition to Motion to Dismiss Appeal, Declaration of Roger Jon Diamond; Exhibits 3 & 4, all of which are part of the appellate record.) While this constitutional issue was ultimately redressed, it is an example of the widespread governmental misconduct occurring in Ventura County.

2/ As an example of the State's lack of prejudice caused by petitioner's flight, after his return to custody over $100,000 of the cash bail was awarded to Ventura County by the Ventura County Superior Court as compensation for the cost of apprehending the petitioner.

charged petitioner with multiple counts of sexual assault, drug and weapons possession, and poisoning involving three victims.

From the very start there were allegations by the defense of misconduct on the part of the Ventura County Sheriff's Deputies, in the legality of the search, in the handling of evidence, as well as in the physical and emotional abuse of petitioner while in custody.[3/]

3/ Several weeks after his arrest, petitioner was taken out of his cell in the Ventura County Jail in the middle of the night by a group of deputies and taken to an interview room. Petitioner was ordered to disrobe. When he hesitated, he was told that if he did not want to do it himself, the "goon" squad would come in and do it for him. Petitioner complied. Petitioner was photographed from numerous angles, with the emphasis on his genital area. He was then ordered to pluck his own pubic and head hairs and provide them to the deputies. He was eventually allowed to dress himself and was returned to his cell. White it is permissible in some cases, for instance where rape is alleged and the identification of the rapist is at issue, for these kinds of photographs and samples to be taken, identification was not an issue in this case. Moreover, there are particular ways in which DNA hair samples are obtained in order to avoid issues of cross-contamination. Gloves are worn by technicians who obtain the samples with gloved hands and by the use of sterile equipment. Because this dehumanizing of petitioner appeared to be yet another example of misconduct on the part of the Ventura County Sheriff's deputies, petitioner sought discovery of the photographs and the identity of the offending deputies. The prosecution was repeatedly asked to turn over the photographs and identify the deputies; the prosecution repeatedly asserted that it had nothing to turn over. Over a year after the photographs were taken, they were finally turned over to the defense. When the defense filed a subpoena duces tecum asking for the county jail log in an effort to identify the deputies involved, the motion was denied.

The prosecution's entire case depended on two of the video tapes that the prosecution argued depicted petitioner raping two unconscious women, Tonja and Shauna. It was these two women which were the source of almost all of the 87 counts with which petitioner was charged at trial.

In addition, two other video tapes were allegedly seized that depicted Tonja and petitioner in clearly consensual sexual situations. In one of the tapes, Tonja agreed to take GHB with petitioner prior to engaging in consensual sexual acts with him in front of the video camera.[4/] Prior to and during the sexual encounter with petitioner, Tonja acknowledged the camera at least twice, at one point asking petitioner if the camera is on. In another tape, petitioner appeared to be directing Tonja in certain sexual "scenes."

From the outset, petitioner maintained his innocence, claiming that he did not drug Tonja and Shauna and that the women were not only his lovers, but that they were willing participants in the sexual videotapes. He sought to introduce evidence that in 1996 and 1997 he was producing commercial pornography, pointing to his commercial soft-porn videotapes, Waves and Babes I and II, as proof. More importantly, he claimed the prosecution was hiding and/or had destroyed exculpatory evidence contained on the original videotapes.

The defense alleged that the Ventura County District Attorney's Office had not only failed to provide the defense with exculpatory discovery, in spite of numerous requests for

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4/ This videotape was made in 1996 when it was not a criminal offense to take GHB, a substance easily obtained over the counter in many health food stores.

same, but also that the videotapes and the audiotapes which were the crux of the prosecution's case had been altered and/or tampered with prior to being turned over to the defense.

These allegations were based on sworn affidavits prepared by a defense expert retained to examine the audio and video tapes. It was his professional opinion that the tapes had been altered. Based on his declaration, the defense moved the court for an order allowing the expert to examine the original audio and video tapes to determine whether they had been altered, and so that a comparison could be made between the original tapes and the videotape and audiotape copies that had been provided to the defense.

The defense also asked the court to allow its expert to examine the tape recorders used to record the initial interviews with the complaining witnesses, since many of the tape recorders had "malfunctioned" during crucial points in the interviews, erasing, garbling and in one case splicing together two crucial interviews with Tonja together onto one tape. Based on materials provided to the defense in discovery, the defense alleged that the witnesses had been improperly coached and that portions of statements had been deleted from the audio tapes.

The prosecution filed a written response refuting the allegations of misconduct, indicating, however, that all of the recorders used to interview witnesses in petitioner's case had been discarded at some unknown time without documentation.

The prosecution agreed to allow the defense expert to examine the original tapes only if the defense would stipulate that copies of those tapes, lodged with the court, would be

deemed originals if the originals were damaged or destroyed. Given that the expert had already determined that the original tapes were likely altered, the defense refused to stipulate. This issue became the topic of several oral and written pretrial motions urging the trial court to conduct an evidentiary hearing regarding the allegations of tape tampering and prosecutorial misconduct, as well as to address the issues of misconduct on the part of Ventura County Sheriff's deputies.

The defense also moved the court to conduct an evidentiary hearing regarding the chain of custody of the videotapes, amid evidence that, in addition to the tape tampering discovered by the expert, it appeared that the videotapes seized from petitioner's home had never been properly booked into evidence, and may have passed through numerous hands after being seized from his home. There was a period of approximately one year during which the location of the video tapes was apparently unknown. The court ruled, again without an evidentiary hearing, that there had been no intentional misconduct on the part of law enforcement, ignored the chain of custody issue, and prohibited the defense from bringing the issues of police misconduct and the mishandling of the tapes before the jury.

Trial began on December 3, 2002, over the objection of defense counsel, who by noticed motion and argument advised the trial court that they were not prepared to proceed to trial without viewing the original videotapes. The defense also sought resolution of unresolved pre-trial discovery issues centering around the prosecution's failure to turn over discovery in violation of Brady. The defense motion for a continuance was denied and the defense was ordered to go forward with the trial under protest. (See Brady v. Maryland, 373 U.S. 83 (1963).)

The prosecution sought to prevent the introduction of the two videotapes depicting Tonja and petitioner taking drugs and having sex in front of the camera. The defense objected, arguing that Tonja's propensity to take drugs and make pornographic movies with petitioner was relevant to his defense. While the court initially ruled to exclude the tapes and any mention of them, on December 13, 2002, the court indicated by minute order that the defense would be permitted to inquire about the sexual nature of Tonja's relationship with petitioner.

On December 20, 2002, the last day of trial before the holiday break[5/] Tonja was asked by defense counsel:

"Did you and Andrew ever have sex in front of that video camera."[6/]

Over the prosecution's objection, the witness was permitted to answer, and thereafter gave the false answer of "no." Because defense counsel knew the answer to be false,

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5/ On December 18, 2002, one of the juror's could be heard snoring during the defense cross-examination of a witness. The defense alerted the trial court. The court failed to make an inquiry, instead indicating to the defense that the juror had a breathing disorder, and denied the subsequent defense motion for mistrial. The following day, December 19, the juror wore tinted glasses. To petitioner, this was just more evidence that he could not get a fair trial. This snoring was to continue throughout the trial until, during closing arguments, the juror sitting next to the snoring juror requested that the court move her seat because she had a headache from the snoring.

6/ The original transcript of the December 20, 2002 proceeding was filed with the California Court of Appeal.

he commented, "Beg your pardon," to which the witness persisted in answering "no." (Transcript, p. 78, line 20.)

At sidebar and in open court the prosecution conceded that Tonja had answered untruthfully, contending that it had misunderstood the court's December 13, 2002, minute order and that in reliance on the original order prohibiting the defense from impeaching Tonja with the consensual video tapes, had "prepped [the] witness" telling her with regard to the "consensual videotapes that you have seen and are aware of with Mr. Luster are not coming in . .. Nobody will talk about them, don't go there." The district attorney stated, "If I thought she was gonna be asked questions about those videotapes, I would have gone there on direct." (Transcript, pp. 84-91.) In other words, the prosecution apparently coached the witness not to answer truthfully were certain questions asked.

After a lengthy sidebar and argument outside the presence of the jury, the trial court prohibited defense counsel from impeaching Tonja with the video tapes and ordered defense counsel to stop its cross-examination in that regard.

This violation of petitioner's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution to confront and cross-examine his accusers - - to "strike while the iron is hot" was the last action by the court petitioner saw before the holiday break.

On December 27, 2002, while the court was still on holiday break, the court issued a minute order in an effort to correct the situation. In the order, the court ruled that Tonja would be brought back to the witness stand and the prosecution would be allowed to question her on direct to rehabilitate her, and only then would the defense be permitted

to resume cross-examination. (Exhibit 7, Appellant's Opposition to Motion to Dismiss Appeal, filed with California Court of Appeal.)

In the prosecution's response to the minute order, it recognized the error in the court's ruling:

> The People believe that further tailoring of the Court's order is necessary to circumvent potential appellate issues. The People . . . are concerned that the Court has created an impossible resolution to which neither side can abide. Either the defense should be allowed to cross-examine the witness on the issue of the videotapes (and also thereby necessarily the ability to impeach her with same) or the court should exclude the videotapes (and any cross-examination related thereto) .
> . . .

(Exhbit 8, Appellant's Opposition to Motion to Dismiss Appeal, filed with California Court of Appeal.)

In petitioner's response to the court's December 13 minute order, filed Friday, January 3, 2003, the defense disagreed with the prosecution's remedy, describing it as an effort to "-- strike the question and answer, un-ring the bell, and move on." (Exhbit 9, Appellant's Opposition to Motion to Dismiss Appeal, filed with California Court of Appeal.)

It was then, and is now, petitioner's contention that neither the solution chosen by the court in its December 27 minute order, nor the prosecution's proposal that the court strike the question and answer and thereafter preclude the defense from further inquiry on the videotapes, are curative

of the court's unprecedented error in interrupting the cross-examination of the complaining witness.

On Monday, January 6, 2003, petitioner did not appear in court. The trial court denied defense counsel Diamond's motion to be relieved as attorney of record when Diamond contended he could not fulfill his obligation under the Sixth Amendment to provide petitioner with effective assistance. The trial court found petitioner to be fugitive. Over defense objection, the trial continued the same day, uninterrupted in petitioner's absence.

The defense again sought and the court again denied a motion for mistrial stemming from the denial of petitioner's right to cross examine and impeach Tonja, and the prosecution was thereafter permitted to rehabilitate Tonja on direct prior to Mr. Diamond's cross-examination. Only a brief segment of one of the homemade video tapes was ever shown to the jury.

During closing argument, the prosecution committed Griffin error when it argued that it was petitioner's fault that the only reason there had been a trial was because petitioner refused to plead guilty. The defense moved for a mistrial, which the trial court denied, refusing to admonish the jury that such argument was improper. On January 21, 2003, the jury found petitioner guilty in absentia of multiple rape counts and other violations of the law. (See Griffin v. California, 380 U.S. 609, (1965).

Over defense counsel's objection, the trial court set sentencing for February 18, 2003. On January 24, 2003, the prosecution filed points and authorities requesting that petitioner be sentenced in his absence, notwithstanding its acknowledgment that the court had erred in disrupting the

defense cross examination of Tonja. Defense counsel filed a motion requesting that sentencing be deferred, pointing out that the prosecution was requesting the immediate sentencing in order to start the appellate clock running and to foreclose appellate review of the trial.

On February 18, 2003, defense counsel requested a postponement of the sentencing, arguing that sentencing should be deferred, including in its argument a non-exhaustive list of potential appellate issues, several of which identified constitutional claims. (Exhibit 11, Opposition to Motion to Dismiss Appeal, filed with the California Appellate Court.)

Over defense counsel's objection, petitioner was sentenced in absentia and a sentence of 124 years in prison was imposed. The trial court advised defense counsel of petitioner's right to file a Notice of Appeal.

After the sentencing in this matter but before the time for appeal had expired, on March 17, 2003, the California Court of Appeal handed down its decision in People v. Kang, 107 Cal.App.4th 43 (2003). On April 17, 2003, defense counsel filed a timely Notice of Appeal. On May 9, 2003, the Attorney General filed a motion with the Court of Appeal to dismiss petitioner's appeal on the sole ground that he was a fugitive.

In petitioner's opposition to dismiss his appeal, defense counsel argued that it was fundamentally unfair to dismiss petitioner's appeal without an evidentiary hearing in order to determine what precipitated his flight. In particular, it was argued that since petitioner's first contact with Ventura County law enforcement had showed him that law enforcement was capable of violating his constitutional rights, it was possible that petitioner may have had concerns of

additional misconduct by law enforcement should he be returned to their custody.[7/] (Appellant's Opposition to Motion to Dismiss Appeal, p. 18-19, filed with the California Court of Appeal.)

On June 10, 2003, without benefit of oral argument or a review of the record, the Court of Appeal dismissed petitioner's appeal without explanation. (Appendix A.) The next day, the California Supreme Court denied the attorney general's motion to depublish Kang, supra. By virtue of California Court Rule 24(b), the dismissal was not final for 30 days.

Eight days later, on June 18, 2003, petitioner was apprehended in PuertoVallarta, Mexico, by an unlicensed bounty hunter, who kidnaped and beat him. Petitioner was rescued by Mexican law enforcement, who turned him over to agents from the Federal Bureau of Investigation pursuant to a federal warrant. The agents delivered him to the custody of the Department of Corrections on June 19, 2003, before the judgment became final pursuant to Rule 24(b).

Accordingly, petitioner filed a timely Petition for Rehearing relying heavily upon People v. Kang, supra, requesting that petitioner be allowed to go forward with his appeal, arguing that there were numerous meritorious constitutional issues to be reviewed.

7/ See for example United States v. Bailey, 444 U.S. 395, People v. Lovecamp, 43 Cal.App.3d 823, for the premise that under certain situations a defendant may claim a defense of necessity for escape and/or failure to appear.

On July 1, 2003, the California Attorney General filed his Answer to the Petition for Rehearing wherein he conceded petitioner was in custody in California as of June 19, 2003. On July 2, 2003, petitioner's petition for rehearing was denied by opinion and order explaining why petitioner should not be permitted to appeal. (Appendix B.)

A timely Petition for Review was filed in the California Supreme Court, and was denied on September 10, 2003. (Appendix C.)

REASON FOR GRANTING THE WRIT

I. Certiorari Is Necessary to Determine Whether the Constitution Imposes Limits on a State's Refusal to Hear a Criminal Appeal on the Basis of the Fugitive Disentitlement Doctrine, And, If So, What Those Limits Are.

Petitioner asks this Court to consider whether the Constitution imposes limits on a State's refusal to hear a criminal appeal on the basis of the fugitive disentitlement doctrine, and, if so, what those limits are. Specifically, this case presents the question whether due process is violated when a state court whose dismissal order has not become final refuses to reinstate the direct appeal of a former fugitive who fled before, not during, the appellate process, who was returned to custody prior to the dismissal order becoming final, whose appeal would, raise substantial federal constitutional issues, including police and prosecutorial misconduct, the Sixth Amendment right to cross examine and confront one's accusers, the right to due process and a fair trial, and whose right to direct federal review of those questions may be completely blocked by the state court's ruling.

Criminal appeals involving fugitives and former fugitives present recurring problems. State cases on the subject are legion, and in substantial disarray. See generally James L. Buchwalter, Annotation, *Effect of Escape by, or Fugitive Status of, State Criminal Defendant on Availability of Appeal or Other Post-Verdict or Post-Conviction Relief – State Cases*, 105 A.L.R.5th 529 (2003). This Court has never addressed whether the due process clause of the Fourteenth Amendment permits the foreclosure of an appeal of a person whose flight occurred during the trial and who has been returned to

custody. However, the Court's decisions, considered together, suggest that barring a meritorious appeal because the defendant was formerly a fugitive would be constitutionally permissible only where refusal to entertain the appeal is justified by reference to important governmental interests, none of which was implicated here. The Court has never addressed whether the defendant's intention to raise federal constitutional issues on his appeal affects the analysis.

To be sure, no court is compelled to decide the appeal of a defendant while he remains a fugitive. Courts, including this one, have, in the exercise of their discretion, declined to hear the appeal of a defendant who calls upon the court to adjudicate his appeal while he continues his fugitive status. The primary rationale is a simple one: concern with the enforceability of any judgment the court might render.

Even so, implicitly recognizing the importance of appellate review, this Court has exercised its undoubted power to refuse to hear a fugitive's appeal with restraint. Thus, in Smith v. United States, 94 U.S. 97 (1876), this Court continued on its docket for six years the appeal by writ of error of a defendant who had escaped from custody. After six years, the Court dismissed the case on motion of the government, then granted the motion of the defendant's counsel to reinstate the appeal, denying only counsel's motion to set the case down for oral argument, and ordering that the case be left off the docket unless the defendant submit to custody before the commencement of the Court's next term. The Court explained:

> If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances we

> are not inclined to hear and decide what may prove to be only a moot case.

94 U.S. at 97.

Similarly, in Bonahan v. Nebraska, 125 U.S. 692 (1887), on writ of error, this Court ordered that the submission of the case be set aside unless the defendant who was still a fugitive "is brought or comes within the jurisdiction and under the control of the court below on or before the last day" of the Court's term, the cause to be "thereafter left off the docket until directions to the contrary." More recently, in Molinaro v. New Jersey, 396 U.S. 365 (1970)(per curiam), citing Smith and Bonahan, this Court declined to adjudicate an appeal of a defendant convicted for abortion where the State advised that the defendant, who had been free on bail, had refused to surrender and was considered a fugitive.

In Allen v. Georgia, 166 U.S. 138 (1897), this Court held that the defendant was not denied due process of law where the Supreme Court of Georgia ordered that an appeal be dismissed unless the defendant surrendered himself or was recaptured within 60 days, and where the state court dismissed the appeal after 60 days had elapsed without the defendant having been returned to custody. The Court found no constitutional impropriety in the state court's dismissal at a time when the defendant remained a fugitive, writing that,

> It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ [of error] than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.

166 U.S. at 141.

Noting that Georgia's constitutional and statutory law required its Supreme Court to dispose of every case at the first term, this Court stated:

> Whether the court should give the plaintiff 60 days, or until the last day of the term, to appear and surrender himself to custody, was a matter for the court to determine; and, even if there were error in that particular, it would not constitute a denial of due process.

Id. at 142.

The protection of the dignity of the court – an interest alluded to in Allen v. Georgia – as well as other interests that might justify the dismissal of appeals based on the defendant being – or having been – a fugitive, were discussed at length in Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), a case decided under this Court's supervisory powers over the lower federal courts.

In Ortega-Rodriguez, this Court considered the propriety of a federal court's dismissal of the appeal of a defendant who fled after conviction, but before sentencing, and who had been recaptured prior to the commencement of his appeal. The Court identified the rationales that support the dismissal of an appeal of a defendant who has fled, concluding that each of them provided "some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response." 507 U.S. at 1205-06.

First, there are the enforceability concerns animating Smith and the cases that followed. Id. at 1206. Second, there are concerns about the "efficient operation of the appellate process" that may be implicated where a defendant has been a fugitive. Id. Finally, as Molinaro indicated, there exists concerns for the protection of the dignity of an appellate court. Id. In this regard, it is often said that when a fugitive "flouts" the authority of the court by escaping, dismissal is an appropriate sanction. The premise of Molinaro's disentitlement theory is that the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the resources of the court to adjudicate his claim.

However, under Ortega-Rodriguez, sanctioning a defendant for offending a court's dignity is not without limits: dismissal of an appeal on the basis of judicial defiance is appropriate only where the defendant's defiance was directed at the court which he then asked to adjudicate his case. Where the defendant's flight occurred when the case was still in the trial court, the defiance was directed at that court, not the court subsequently asked to adjudicate the appeal. Under those circumstances, the Court ruled that the appellate court could dismiss the appeal of a fugitive returned to custody only where it was shown that the defendant's prior fugitive status had had an effect on the appeal. See also Degen v. United States, 517 U.S. 820 (1996)(applying analysis of Ortega-Rodriguez and holding that the fugitive disentitlement doctrine did not permit the federal district court to enter summary judgment in favor of government in civil forfeiture case, on grounds claimant was outside the United States and could not be extradited to face federal drug charges).

The Ortega-Rodriguez Court did not purport to be addressing any constitutional issues, but its constitutional implications are manifest.

Following Ortega-Rodriguez, in Branch v. Turner, 37 F.3d 371 (8th Cir. 1994), the Court of Appeals for the Eighth Circuit granted habeas relief to a recaptured fugitive whose state appeal had been dismissed, squarely ruling that dismissal of an appeal where pre-appeal flight had no adverse effect on the appellate process violated the defendant's due process rights.

This Court, in Goeke v. Branch, 514 U.S. 115 (1995) reversed, on Teague non-retroactivity grounds, recognizing that it had never determined whether the limits on the fugitive dismissal doctrine outlined in Ortega-Rodriguez were constitutionally compelled, and noting that, to the extent the Eighth Circuit's ruling rested upon Ortega-Rodriguez, that case was decided almost two years after Branch's conviction had become final. 514 U.S. at 115-119.

The constitutional issue thus remains unanswered.[8/] The Supreme Court of Missouri has held that due process was not

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8/ In Estelle v. Dorrough, 420 U.S. 534 (1975), a divided Court ruled that the equal protection rights of a defendant, who escaped from confinement after his appeal had been filed and was recaptured two days later, were not violated when his appeal was dismissed pursuant to a Texas statute and indicated that his due process rights were not violated either. (420 U.S. at 538, n.7). The challenged statute provided for automatic dismissal of a pending appeal by an escaped felon upon escape, but for reinstatement of the appeal if he should voluntarily surrender within ten days. The case at bar does not involve a legislative enactment, but an ad hoc determination by the state court.

violated by application of the escape rule to bar the direct appeal of a defendant who escaped before sentencing and was recaptured prior to initiating his appeal, where the defendant's escape had delayed the proceedings for more than eight months while he was at large. See State v. Troupe, 891 S.W.2d 808 (1995). On the other hand, in Mascarenas v. State, 94 N.M. 506, 612 P.2d 1317 (1980), the Supreme Court of New Mexico held, on state constitutional grounds, that a prisoner who escapes from custody does not forfeit the right to pursue an appeal that was pending at the time of the escape, regardless of when any recapture occurs. In State v. Tuttle, 713 P.2d 703 (1985), the Utah Supreme Court concluded "that a criminal appeal dismissed after escape may be reinstated [once the defendant is apprehended] unless the State can show that it has been prejudiced by the defendant's absence and the consequent lapse of time." 713 P.2d at p. 705. In reaching this conclusion, the Tuttle court reasoned:

> . . . [the premise] that an escape is an intentional abandonment of an appeal [is] founded upon a questionable presumption, i.e., that one who escapes has actually made a decision to abandon his appeal. A far more reasonable assumption is that the escapee has not even considered how his escape will affect his appeal rights.

Id. at p. 704.

Tuttle also concluded that "denying reinstatement really amounts to imposition . . . of a punishment for escape." Id. at pp. 704-705. The court found "[n]either law nor logic justifies . . . such a sanction. . . a punishment related not to the offense - the escape - but to the crime of which the escapee was originally convicted." Id. at p. 705.

The court continued:

> For example, if one escapee had been erroneously convicted of first degree murder and sentenced to life imprisonment and another had been wrongfully convicted of theft and sentenced to one year, a refusal to reinstate either appeal would have the effect of imposing dramatically different punishments for the same offense - escape.

Id.

It is understood that the due process clause contains a component that protects individuals from government action that is arbitrary, Daniels v. Williams, 474 U.S. 327, 331(1986), conscience-shocking, Rochin v. California, 342 U.S. 165 (1952), oppressive in a constitutional sense, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), or interferes with fundamental rights, United States v. Salerno, 481 U.S. 739, 746(1987). It follows that a state appellate court should not be permitted to deny a defendant the right to appeal through the arbitrary application of an appellate rule. Evitts v. Lucey, 469 U.S. 387 (1985), 404-405. State appellate courts must apply their rules governing appellate review in a way that provides "a fair opportunity to obtain an adjudication on the merits of [an] appeal." Evitts, 469 U.S. at 405.

As previously noted, the justifications consistently provided by this Court for allowing the dismissal of fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process. However, if a defendant's pre-appeal flight does not adversely affect the appellate process, there can be no rational justification for a state appellate court to strip the defendant of the right to

appeal under the fugitive dismissal rule. The fugitive dismissal rule is the means of protecting the appellate interests served by the rule and is not an end in itself and should not be transformed from a rule triggered by appellate consequences into an unconstitutional one of automatic dismissal and additional punishment for pre-appeal flight, as occurred here. Branch v. Turner, supra, 37 F.3d 371.

In its unpublished opinion on denial of rehearing, the California Court of Appeal made a weak attempt to draw a nexus between petitioner's flight and its adverse affect on his appeal by pointing out that the appellate court had reduced petitioner's bail two years before he fled. (See Appendix B.) The court failed to explain how this previous bail reduction has anything to do with his current appeal. It appears that the judges of the California Court of Appeal may have felt wronged. Petitioner is aware of no decision that holds or suggests that an appellate court's dignity is sufficiently offended by flight to justify dismissal if it has set bail, when jurisdiction resided elsewhere at the time of flight.

The California Court of Appeal should have based it decision as to whether a dismissal of petitioner's appeal was justified on whether or not petitioner's misconduct had any effect on California appellate procedures. In its unpublished opinion, the appellate court made no suggestion that considerations of enforceability, judicial dignity, or judicial efficiency justified its refusal to reinstate petitioner's appeal, dismissal of which had not yet become final under the Court's own rules.

Petitioner was in custody when he asked the Court of Appeal to reinstate his appeal, so no issues of enforceability existed. The judicial dignity of the Court of Appeal was not at issue, because petitioner's escape had occurred during trial.

Nor could considerations of judicial efficiency or orderly judicial procedures justify the refusal to reinstate the appeal. Petitioner was sentenced on February 18, 2003; his notice of appeal was timely filed on April 17,[9/] the Court of Appeals dismissed the appeal, on the State's motion on June 10, 2003, and was asked to reinstate it, following the Petitioner's return to custody on June 18, 2003.[10/]

The California appellate court's misuse of the rule to dismiss petitioner's appeal runs against the grain of due process, particularly since petitioner claims constitutional deprivations on appeal that neither the California appellate court nor the State suggests are legally frivolous, and are indeed substantial. Thus, the appellate court's dismissal is clearly at odds with this Court's recognition that a convicted defendant's liberty should not be curtailed "unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with law." Evitts, 469 U.S. at 403-04. Instead, the California Court of Appeal deprived

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9/ That petitioner remained a fugitive at the time his counsel filed his notice of appeal cannot properly be considered an affront to the dignity of the appeals court; California court rules do not prevent an absent defendant from filing a notice of appeal.

10/ Under California Rules of Court 35, once a notice of appeal is filed, the superior court has 20 days to prepare the transcripts for appeal and has the option of asking for an extension, which it often does. Once the transcripts are filed, appellant has 30 days to file an opening brief, also with the option of asking for an extension, which often occurs and is almost always granted. Under the facts of this case, petitioner would have been returned to custody prior to the filing of his opening brief. As noted above, this is perfectly acceptable as the court rules do not prevent an absent defendant from filing a notice of appeal.

petitioner of the fair opportunity to obtain a decision on the merits of his appeal in violation of his due process rights.

Indeed, rather than furthering one or more governmental purposes, the refusal of the California Court of Appeal to reinstate petitioner's appeal appears to be an aberration even in that jurisdiction. Historically, where a defendant is absent during the pendency of his appeal, the courts of California have given the defendant a fixed period of time in which to surrender, making dismissal of the appeal contingent upon the failure to surrender within the time given.[11/] Thus, in People v. Redinger, 55 Cal. 290, 5 P.C.L.J. 696 (1880), after the defendant's appeal was called for argument, the State moved to dismiss the appeal on the ground that the defendant had escaped from jail during the pendency of the appeal and was no longer in custody to abide the sentence of the court. The court, after careful consideration of the precedents from other jurisdictions, denied the State's motion to dismiss then and there, ordering instead that the case be dismissed only if the defendant failed to return to custody by a date which it set. See also People v. Elkins, 122 Cal. 654 (1898) (same, giving defendant 30 days to return to custody); People v. Sitz, 21 Cal. App. 54 (Cal.App.2d Dist. 1913)(ordered appeal dismissed unless defendant surrendered within 30 days); People v. Buffalo, 49 Cal. App. 3d 838, 123 Cal.Rptr. 308 (4th Dist. 1975) (same). More recently, in People v. Kubby, 97 Cal. App. 4th 619, 118 Cal. Rptr. 2d 588 (3d Dist. 2002), the California Court of Appeal, ordered a defendant's cross-appeal dismissed unless he surrendered within 30 days, ruling that he could not prosecute his cross-appeal while he remained a fugitive.

11/ California law does not reflect any legislative judgment that dismissal of appeals operates to deter flight.

In People v. Clark, 201 Cal. 474, 259 P. 47 (1927), the Supreme Court of California was asked to reinstate an appeal that was previously dismissed when the defendant failed to reappear within the 30 days the Court gave him to surrender, or suffer dismissal of his appeal. After the Court entered its order finally dismissing his appeal, the defendant was apprehended, and moved to set aside the order of dismissal and to reinstate the appeal. Noting that there was no statute governing the situation, the California Supreme Court ruled that the power to reinstate should be exercised "where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong upon the appellant." 201 Cal. at 478. Only after carefully considering the defendant's appellate claims and determining that his appeal lacked merit did the Court pronounce itself "satisfied in the present action that no advantage would accrue to the appellant by reinstatement of the appeal." Id.

> . . . The record on appeal before us presents no sufficient showing that would justify a reversal of the judgment. It would accomplish no useful purpose and it would avail nothing to the appellant to reinstate his appeal, as a consideration thereof could only result in an affirmance of the judgment. We therefore feel constrained to deny appellant's motion to set aside the order dismissing his appeal, and it is so ordered.

Id. at 486. Even so, one Justice dissented.

In People v. Kang, 107 Cal. App. 4th 43, 131 Cal. Rptr. 2d 447 (2d Dist. 2003), decided only three months before petitioner's appeal was dismissed, the defendant was convicted on multiple counts of rape, sodomy, robbery, burglary, and conspiracy. Ten days after the verdict, Kang posted a $2.5 million bond and was released from custody.

On April 6, 1999, Kang failed to appear for sentencing. Several months later, on June 21, 1999, after finding there had been due diligence to locate Kang, he was sentenced to multiple life sentences in absentia. Several *years* later, Kang was extradited from South Korea.

In Kang, the defendant's fugitive status precluded consolidation of his appeal with his codefendants' appeal, which resulted in the loss of an efficient disposition of related appeals. Some courts have found this basis alone enough to justify the loss of the statutory right to appeal. Other courts, including the court in Kang, found that this was an inadequate basis by itself to disallow appellate review. The California Court of Appeal found that dismissing Kang's appeal would "work a palpable injustice . . . without a full review of the record with the benefit of briefing and oral argument." See People v. Clark, 201 Cal. 474, 477 (1927). The Kang court found that a defendant whose attorney had filed a notice of appeal while defendant remained a fugitive, and whose appeal had been dismissed, was entitled to pursue his criminal appeal anew after being apprehended and returned to custody:

> . . . Because Kang is now in custody and no longer a fugitive, the decision of the appellate court is enforceable. It may be true that Kang flouted the authority of the trial court when he failed to appear for sentencing and became a fugitive, but disentitlement of Kang to foreclose appellate review is not desirable. If it is essential to vindicate judicial authority, the prosecution may charge Kang with failure to appear pursuant to Penal Code section 1320.5, although the penalty for that crime pales in comparison with the sentence imposed by the trial court. Put in perspective, disentitlement is largely symbolic. Also,

> any consideration that dismissal discourages escape is speculative at best.

107 Cal. App. at 51-52.

Like Kang, petitioner fled while his case was pending in the trial court, not the court of appeal. Yet petitioner appears to be the sole individual who has not been given a grace period in which to submit to custody on pain of having his appeal dismissed, and whose request for reinstatement of his appeal was denied without consideration of its merits.

Thus, the California Court of Appeal arbitrarily and capriciously applied its fugitive dismissal rule to petitioner, though he stood in no different position than Kang, imposing a totally irrational and disproportionate punishment for flight.

As it stands now, the California Court of Appeal may arbitrarily select certain cases for dismissal and allow fugitives in other cases to file an appeal, literally exercising veto power over a defendant's statutory right to appeal. For that reason alone, the foreclosure of petitioner's appeal takes on an arbitrary and capricious character which raises serious questions as to fundamental fairness, and thus, of due process and equal protection.

Even if California applied its rules consistently, application of the fugitive dismissal rule necessarily operates capriciously, and in an upside-down fashion. It works no punishment on those who have no legitimate appellate claims, penalizing only those whose convictions would be subject to reversal because of reversible error in the trial court. Moreover, it inflicts a punishment – letting stand convictions which are, by definition, infirm, together with the sentences imposed in connection with such convictions – that has no

relationship to the defendant's misconduct, his flight. It works a particular hardship on an individual, like petitioner, who maintains his innocence and who fled, in a panic when it appeared that his criminal trial was not providing a fair forum for the adjudication of his guilt or innocence, and that he might be returned to the custody of the same deputies from whom he had suffered abuse.

To be sure, flight was the wrong response, and the law provides stiff sanctions for that offense.[12/] But the sanction of depriving petitioner of an opportunity to challenge the fairness and validity of his conviction and 124-year sentence bears no rational relationship to any of the interests the fugitive dismissal doctrine may be said to exist to serve, particularly where there are demonstrable constitutional infirmities in the underlying conviction.

The appellate process exists as part of the system of criminal justice in all fifty states and in the federal system in recognition of the fact that trial courts make mistakes, often of constitutional magnitude. It has been said that "there is . . . no constitutional right to an appeal," Jones v. Barnes, 463 U.S. 745, 751 (1983); see also Griffin v. Illinois, 351 U.S. 12, 18 (1956), ("a State is not required by the Federal Constitution to provide appellate courts or a right to appellate

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12/ Penal Code Section 1320.5. Willful failure to appear for felony charge: Every person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of felony. Upon conviction under this section, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) or by imprisonment in the state prison, or in the county jail for not more than one year, or by both the fine and imprisonment.

review at all"). But that proposition is itself subject to doubt.[13/] See Jones v. Barnes, 463 U.S. 745, 757 n.1 (1983) (Brennan, J. and Marshall, J. concurring) ("If the question were to come before us in a proper case . . . I have little doubt that we would decide that a State must afford at least some opportunity for review of convictions.").

Under current law, the appellate process – and not habeas corpus – provides the principle vehicle for insuring that a criminal defendant's conviction was not obtained through a violation of his constitutional rights. See, e.g., Sawyer v. Smith, 497 U.S. 227, 241 (1990) ("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.") But the California court's disposition may operate to foreclose not only state appellate review, but any federal review of his Constitutional claims, whether through writ of certiorari or perhaps even via habeas corpus proceedings.

In any event, even if a state has no obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy due process. Evitts 469 U.S. at 396 .

13/ The sole case cited in Griffin for the proposition is McKane v. Dustin, 153 U.S. 684 (1894), where the question was whether the defendant had a federal right to bail pending his appeal of his conviction; the right to take an appeal was not at issue.

CONCLUSION

Petitioner respectfully submits that California Court of Appeal's refusal to allow him to go forward with his appeal did violate his right to due process.

Accordingly, he respectfully prays that his Petition for a Writ of Certiorari be granted.

Dated: December 9, 2003

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE — No. B166741

Plaintiff and Respondent — (Sup. Ct. No CR49259)

v.

ORDER

ANDREW STUART LUSTER

Entered
06/10/2003

Defendant and Appellant.

The Court has read and considered respondent's motion to dismiss the appeal, filed May 9, 2003, and the opposition thereto, filed by appellant on May 27, 2003.

IT IS ORDERED that the motion to dismiss is granted. The appeal filed April 17, 2003 is hereby dismissed.

YEGAN — PERREN, J.

Acting Presiding Justice — Justice

APPENDIX B

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT-DIVISION SIX

THE PEOPLE

Plaintiff and Respondent

v.

ANDREW STUART LUSTER

Defendant and Appellant.

2d. Crim No. B166741
(Sup. Ct. No CR49259)
(Ventura County)

OPINION ON DENIAL OF REHEARING AND ORDER
Entered 07/02/2003
FILED
July 2, 2003
Joseph A. Lane, Clerk
Deputy Clerk

By order filed June 10, 2003, this Court dismissed the appeal of Andrew Stuart Luster, without opinion, because he was a fugitive from justice. He had been sentenced in absentia on February 18, 2003. We dismissed the appeal on noticed motion after considering the opposition papers. (Cal. Rules of Court, Rule 41, subs. (a) (b).) He now ask this court to grant rehearing and reinstate his appeal because he was captured on June 19, 2003, returned to California, and has commenced to serve his prison term. As we shall explain, these subsequent events do not require reinstatement of the appeal. We issue this opinion on denial of rehearing to briefly explain why this appeal should remain dismissed. (See

Witkin, Cal. Procedure (4th ed. 1997) vol. 9, § 856, pp. 889-890.)

"[A]n appellate court may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings." (*Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 246 [122L.Ed.2d 581, 595].) "It is often said that a fugitive 'flouts' the authority of the court by escaping, and that dismissal is an appropriate sanction for his act of disrespect. (Citations.)"(*Id.*, at p. 245[122 L.Ed.2d at p. 595) Recapture of the fugitive before any appellate process has begun and which does not interfere with the efficient operation of the appellate court may lead to reinstatement. (*Id.*, pp. 244-246 [122 L.Ed.2d at pp. 594-595] compare *Allen v. Georgia* (1897) 166 U.S. 138 [41 L.Ed. 949].)

Petitioner contends that "he did not flout the authority of the Court of Appeal but if the Attorney General is correct in his assertion that Luster fled intentionally then only the authority of the trial court is flouted." (Supp. To Petn. For Rehg. P. 7.) This is a myopic view of the record. Here there is the required nexus between appellant's fugitive status and the appellate process. (*Ortega-Rodriguez v. United States*, supra, 507 U.S. at pp. 249, 251 [122 L.Ed.2d at pp. 597, 599.) Petitioner was originally incarcerated with the trial court setting bail at $10,000,000. In an unprecedented writ proceeding before this court, we were compelled to reduce bail because the court's order was a deprivation of the constitutional right to bail. We set bail at $1,000,000 along with other terms and conditions. (B145137, nonpublished opinion by Yegan J.; Gilbert, P.J. and Perren, J. Concurring.) Petitioner posted the bail, and complied with the other terms and conditions for approximately two years, but fled during jury trial.

Had petitioner voluntarily reappeared, he would have a much stronger argument for reinstatement of the appeal. By his flight to a foreign country, the inference is compelling that but for his capture he would be a fugitive to this day. That he is now serving his prison sentence and is once again subject to the court's power does not, standing alone, provide a compelling reason for reinstatement.

Our ruling denying the petition for rehearing 1. upholds the authority of the Court of Appeal and discourages the flouting of the criminal justice system, 2. discourages felony escape, 3. encourages voluntary surrender, 4. promotes the orderly administration of justice, and 5. protects the people from prejudice by the passage of time in the event of reversal on appeal. Petitioner knew, or should have known, that his flight could be viewed as a waiver or abandonment of a statutory right to appeal. (*Ortega-Rodriguez v. United States*, supra, 507 U.S. pp. 240 [120 L.Ed.2d at pp. 591-592].)

Petitioner places reliance on the recent per curium opinion from division four of the court, *People v. Kang* (2003) 107 Cal.App.4th 43. The authorities relied upon by *Kang*, while instructive, do not require that the appeal be reinstated. (See *Auto Equity Sales Inc. v. Superior court* (1962) 57 Cal.2d 450, 455.) Moreover, we strongly disagree with *Kang's* assumption that it is speculative that "dismissal discourages escape." (*People v. Kang*, supra, 107 Cal.App.4th at p. 52.) To the contrary, and as the Attorney General points out, the *Kang* decision gives the defendant in a case such as this incentive to flee because by doing so he has little to lose.

The petition for rehearing is denied.
NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

B-5

Ken W. Riley, Judge

Superior Court of Ventura

Roger Jon Diamond, for Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan, Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX C

Court of Appeal, Second Appellate District,
Division Six - No. B166741
S116867

IN THE SUPREME COURT OF CALIFORNIA
En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANDREW STUART LUSTER, Defendant and Appellant.

Petition for review is DENIED

SUPREME COURT
FILED
SEP 10 2003
Entered 09/10/2003

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE
Chief Justice